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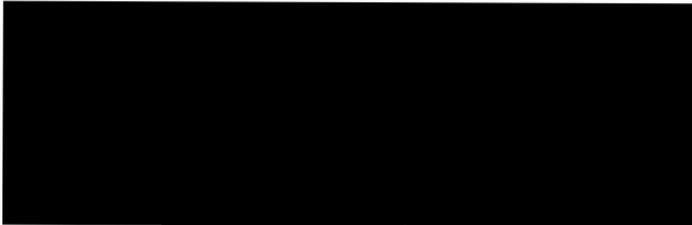
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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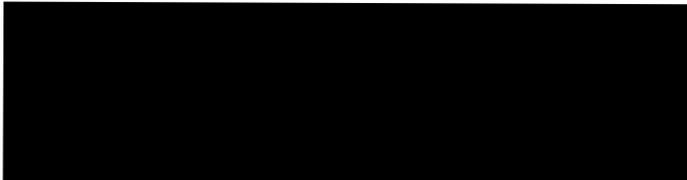
FILE: [redacted] Office: VERMONT SERVICE CENTER Date: **JUL 06 2006**
EAC 04 153 50477

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor accompanied the petition. The acting director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$32,000 per year.

On the petition, the petitioner stated that it was established during 1984 and that it employs four workers. The petition states that the petitioner's gross annual income is "\$300,000+" but does not state the petitioner's net annual income in the space provided. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Brooklyn, New York.

In support of the petition, counsel submitted the petitioner's 2001 and 2002 Form 1120, U.S. Corporation Income Tax Returns and a letter dated April 13, 2004 from the petitioner's president.

The petitioner's tax returns show that it is a corporation, that it incorporated on November 11, 1985, and that it reports taxes pursuant to cash convention accounting and a fiscal year running from November 1 of the nominal year to October 31 of the following year.

The 2001 return shows that during its 2001 fiscal year the petitioner declared taxable income before net operating loss deductions and special deductions of \$18,679. The corresponding Schedule L shows that at the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

The 2002 return shows that during its 2002 fiscal year the petitioner declared taxable income before net operating loss deductions and special deductions of \$18,597. The corresponding Schedule L shows that at the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

The petitioner's president's April 13, 2004 letter cites the tax returns as evidence of the petitioner's ability to pay the proffered wage.

The acting director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on October 20, 2004, denied the petition.

On appeal, counsel submitted (1) bank statements, (2) a letter dated November 17, 2004 from a real estate broker, (3) copies of other documents previously submitted, and (4) a brief.

The November 17, 2004 real estate brokers letter is accompanied by a sales comparison and purports to estimate the value¹ of the property at [REDACTED] in Brooklyn, the address of the petitioning restaurant. Although that value estimate is represented as an appraisal, the Statement of Limiting Conditions that would have accompanied that letter if it were an appraisal was not included. That letter estimates the value of the subject property to be between \$800,000 and \$850,000.

In the brief counsel cites the petitioner's gross receipts, its total wage expense, its depreciation deduction, and its year-end cash as evidence of its ability to pay the proffered wage. Counsel cites three non-precedent decisions of this office for the proposition that the petitioner's depreciation deduction represents additional funds available to pay wages. Counsel cites additional non-precedent cases for the proposition that bank balances and end-of-year cash should be considered in the determination of a petitioner's ability to pay the proffered wage.

Counsel states that the petitioner's owner has a \$10,000 balance in his bank account and personal funds of \$100,000. Counsel provides no evidence in support of those assertions.² Counsel also implies that the petitioner's owner also owns the house that was the subject of the value estimate shown above as additional evidence of that ability. Counsel offers no evidence in support of that assertion, however, nor evidence to demonstrate that the property is unencumbered.³ Counsel states, "**In the instant case, the petitioner has . . . experienced continual business growth with each passing year.**" [Emphasis in the original.] From that

¹ Typically a real estate broker is not able to charge a fee for an appraisal without licensure or certification as a real estate appraiser. The record contains no indication that the broker is a licensed or certified real estate appraiser.

² The bank statements provided pertain to the petitioner's accounts, rather than those of the petitioner's owner.

³ The ownership of real property and the amount by which it is encumbered would typically be determined by a professional title search. The record contains no evidence that the broker in this case is qualified to perform such a search or that he claims to have performed one.

assertion counsel argues, “IT [sic] is a reasonable expectation that the petitioner will continue to experience a sustained growth” Counsel, however, provides no evidence to support the assertion that the petitioner has experienced continual growth during each year.

The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof. The unsupported assertions of counsel need not be further addressed.

Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that approval of an alien worker petition is not necessarily precluded by low profits during a given year. Counsel also cites two non-precedent decisions for that proposition.

Counsel asserts that, because business owners attempt to reduce their tax liability in reporting income the petitioner’s income tax returns are an inaccurate reflection of its financial strength. Counsel asserts that the acting director’s approach to determining whether the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date is contrary to Generally Accepted Accounting Principles (GAAP) promulgated by the Financial Accounting Standards Board (FASB) and, finally, appears to argue that the petitioner’s owner, rather than CIS, should determine whether the petitioner is able to pay the proffered wage.

Initially, this office notes that it rejects counsel’s assertion that the petitioner’s decision that it is able to pay the proffered wage should not be reviewed by CIS. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that CIS is charged with that determination.

Counsel’s submission of non-precedent decisions is unconvincing. Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel’s citation of non-precedent decisions is of no effect.

Counsel’s reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner’s ability to pay a proffered wage. While this regulation allows additional material “in appropriate cases,” the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner.⁴ Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.⁵

⁴ Counsel’s assertion that tax returns are an inaccurate indicator of a company’s tax position is addressed below.

⁵ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner’s continuing ability to pay the proffered wage beginning on the priority date. If the petitioner’s account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

The evidence does not show that the author of the value estimate in the record is licensed or certified to issue disinterested appraisals. As such, the value estimate is of little evidentiary weight. Even if it were presumed accurate, because it is not accompanied by any indication of the extent to which the subject property may be encumbered, the petitioner's owner's equity in that property cannot be calculated. Further still, as the subject property is the location of the petitioner's restaurant, the petitioner could not necessarily continue in business if the property were alienated. The value of that property is not, therefore, available to pay wages.

Yet another reason exists that the petitioner's owner's equity in that property cannot be considered in the determination of the petitioner's ability to pay the proffered wage. The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Nothing in the governing regulation, 8 C.F.R. § 204.5, permits CIS to consider the financial resources of individuals or entities with no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). The income and assets of the petitioner's owner shall not be further considered.⁶

Counsel asserts that the petitioner's tax returns do not show the true financial condition of the corporation and that the acting director's method of determining the petitioner's ability to pay the proffered wage is not contemplated by GAAP. Those assertions are inapposite. The purpose of the GAAP of the FASB is to standardize financial reporting so that companies' income will be neither overstated nor understated. The purpose of the present inquiry is to determine whether the petitioner, the particular corporation or other U.S. employer that is petitioning for the beneficiary, has the continuing ability to pay the proffered wage beginning on the priority date. The GAAP of the FASB is not designed for this purpose and is not controlling on that issue.

As counsel implies, the characterization of a transaction may differ from tax accounting to financial accounting. Nevertheless, the petitioner is obliged, pursuant to 8 C.F.R. § 204.5(g)(2), to select copies of annual reports, federal tax returns, or audited financial statements to demonstrate its ability to pay the proffered wage. If the evidence it selects fails to demonstrate its continuing ability to pay the proffered wage beginning on the priority date, then the petition shall be denied, notwithstanding that a perfectly legitimate alternative characterization of some number of transactions, pursuant to some other system of accounting, either in accord with generally accepted accounting principles or in accord with the tax code, would have demonstrated its ability to pay the proffered wage.

⁶ This office declines, therefore, to consider the petitioner's owner's equity in the petitioner's building. Further, even if counsel had provided evidence in support of his assertion that the petitioner's owner has a \$10,000 bank balance and \$100,000 in other funds, this office would decline to consider them for the same reason.

Counsel's citation of *Matter of Sonogawa, supra*, is unconvincing. The decision in *Sonogawa* does stand for the principle that a petitioner's losses or low profits⁷ during a given year do not automatically preclude approval of an alien worker petition. *Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonogawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here, the evidence does not demonstrate that the petitioner has ever posted a large profit. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001 and 2002 were uncharacteristically unprofitable fiscal years for the petitioner.⁸ Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost or other basis of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The

⁷ In this context the characterization of annual profits as low means that they are less than the annual amount of the proffered wage and that the petitioner is unable, therefore, to demonstrate its ability to pay the proffered wage out of its profits during that year.

⁸ In fact, counsel stated on page two and again on page six of the brief that the petitioner did not have a bad year, from which this office gathers that the petitioner's performance during fiscal years 2001 and 2002 was characteristic of the petitioner's performance during other years.

petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.⁹ Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable.

The petitioner's gross receipts and its wage expense are not, in themselves, indices of its ability to pay the proffered wage. Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses¹⁰ or otherwise increased its net income,¹¹ the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

Counsel urges that the petitioner's end-of-year cash should be considered. End-of-year cash is taken into consideration in calculating the petitioner's net current assets, which are discussed below.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D.

⁹ Counsel does not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages.

¹⁰ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

¹¹ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). *See also* 8 C.F.R. § 204.5(g)(2).

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically¹² shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$32,000 per year. The priority date is April 27, 2001.

The calculation of the petitioner's ability to pay the proffered wage is complicated somewhat by the petitioner's utilization of a fiscal year running from November 1 of the nominal year to October 31 of the following year.

The earliest tax return submitted was the petitioner's 2001 return, which covers the twelve-month period that began on November 1, 2001. The petitioner submitted no evidence pertinent to the period from the priority date to that date. The petitioner has failed to demonstrate its ability to pay the proffered wage from April 27, 2001 to November 1, 2001.

During its 2001 fiscal year the petitioner declared taxable income before net operating loss deductions and special deductions of \$18,679. That amount is insufficient to pay the proffered wage. At the end of that fiscal year the petitioner declared negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during its 2001 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2001 fiscal year.

¹² The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

During its 2002 fiscal year the petitioner declared taxable income before net operating loss deductions and special deductions of \$18,597. That amount is insufficient to pay the proffered wage. At the end of that fiscal year the petitioner declared negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during its 2002 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2002 fiscal year.

The Form I-140 petition in this matter was submitted on April 25, 2004. On that date the petitioner's fiscal year 2003 tax return was unavailable.¹³ The petitioner is excused from demonstrating its ability to pay the proffered wage during its 2003 fiscal year.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage from the priority date until November 1, 2001 and during its 2001 and 2003 fiscal years. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date and the petition was correctly denied on that basis.

The record contains an additional issue that was not raised in the decision of denial. In support of its claim that the beneficiary has the two years of experience in the job offer that the Form ETA 750 states is a prerequisite for the proffered position the petitioner submitted an affidavit from the beneficiary.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The regulations do not contemplate approval of petitions based on the self-certification of their own employment experience by beneficiaries. The beneficiary's assertion that she has the requisite experience, even though it was given under oath, is insufficient.

Even if the petitioner had satisfied this office on the issue of ability to pay the proffered wage the petition would not have been approvable, but would have been remanded for additional evidence pertinent to the beneficiary's employment history.

¹³ The petitioner's 2003 fiscal year ended on October 31, 2004. Absent an extension the petitioner's tax return was due on February 15, 2004.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.